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14  
15 UNITED STATES DISTRICT COURT  
16 NORTHERN DISTRICT OF CALIFORNIA  
17 SAN FRANCISCO DIVISION

18 SKYWEST PILOTS ALPA ORGANIZING  
COMMITTEE, et al.,

19 Plaintiffs,

20 vs.

21 SKYWEST AIRLINES, INC.,

22 Defendant.  
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Case No. C-07-2688 CRB

**DEFENDANT'S MOTION TO STRIKE  
PLAINTIFFS' HEARSAY TESTIMONY  
CONDITIONALLY ADMITTED OVER  
DEFENDANT'S OBJECTION**

Preliminary injunctive relief is an “extraordinary remedy” the purpose of which is to preserve the “status quo” between the parties pending a final determination on the merits of the plaintiff’s complaint. *Perfect 10, Inc. v. Amazon.com, Inc.*, \_\_ F.3d \_\_, available at, 2007 WL 1428632, at \*4 (9th Cir. 2007). Here, Plaintiffs seek this extraordinary remedy based in large part on inadmissible hearsay testimony. Defendant SkyWest Airlines, Inc. (“SkyWest”) respectfully submits that all of the testimony conditionally admitted over SkyWest’s hearsay objection should be stricken, including the testimony at the June 7, 2007 hearing given by: Steven Dow on direct examination at pages/lines 13:19-15:18; 25:17-27:2; 27:19-28:10; 28:12-22; 37:2-42:2; 45:15-47:20; 51:21-52:3; 52:4-53:14; and 64:4-66:13; David Boehm on direct examination at 166:13-18; Andy Baharath on direct examination at 200:18-201:5; Stephen Kanuch on direct examination at 239:13-242:5; and the testimony at the June 8, 2007 hearing given by Mark Nolin on direct examination at 121:11-123:11.<sup>1</sup>

## I. LEGAL STANDARD

Plaintiffs cited two cases to the Court to support their position that otherwise inadmissible hearsay evidence could be considered in the preliminary injunction (“PI”) context: *Flynt Distributing Co. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984) and *Heideman v. South Salt Lake City*, 348 F.3d 1182 (10th Cir. 2003). Plaintiffs’ reliance on those decisions is misplaced. Neither stands for the proposition that the Court may always admit rank hearsay, without regard to its reliability, particularly where, as here, the proceedings are governed by the Norris LaGuardia Act, 29 U.S.C. § 101, *et seq.* (“NLGA”). In *Flynt*, the Ninth Circuit held that a court may give inadmissible evidence “some weight” in the context of a PI hearing, where necessary to prevent irreparable harm before trial, and where the party could not obtain admissible evidence at the time of the PI hearing. *See Flynt*, 734 F.2d at 1394; *see also Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1364 (9th Cir. 1988) (admitting hearsay statements where evidence was undisputed); *K-2 Ski Co., v. Head Ski Co.*, 467 F.2d 1087, 1088-89 (9th Cir. 1972) (same). Those considerations are not present here. In *Heideman*, the Tenth Circuit did not admit hearsay or even address the issue; it

<sup>1</sup> SkyWest is not challenging admission of the hearsay background testimony concerning the creation of SAPA. (*See* Spagat Decl. Ex. A, June 7, 2007 Hearing Tr. at 123:5-126:18.) These facts are undisputed.

1 merely stated in its recitation of the standard of review that the Federal Rules of Evidence did not  
 2 apply. *Heideman*, 348 F.3d at 1188. *Heideman* is not binding. Moreover, neither *Flynt* or  
 3 *Heideman* was decided in proceedings governed by the NLGA.

4 Under the NGLA, a preliminary injunction cannot issue “except after hearing the testimony  
 5 of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a  
 6 complaint made under oath, and testimony in opposition thereto.” 29 U.S.C. § 107. This provision  
 7 “is about ensuring the presence of reliable evidence before a court may enjoin parties to a labor  
 8 dispute.” *Delta Airlines, Inc. v. Air Line Pilot Ass’n, Int’l*, 238 F.3d 1300, 1310 (11th Cir. 2001),  
 9 *cert. denied*, 532 U.S. 1019 (2001) (emphasis added). In *Delta Airlines*, the Eleventh Circuit held  
 10 that a district court has discretion to consider hearsay in the context of a PI hearing only in very  
 11 limited circumstances, *i.e.*, when the evidence is “largely undisputed,” there is no dispute about the  
 12 reliability of the evidence and there is no harm to the parties. *Id.* at 1310-11.

## 13 II. ARGUMENT

14 Hearsay about oral conversations obviously is an unreliable source of evidence, a point  
 15 illustrated by the testimony of Plaintiff Phil Alford. Alford testified that he was told by Mike  
 16 Eisenstadt that Eisenstadt was summarily terminated by Brad Holt for proposing that SAPA go to  
 17 the NMB to get certified as the pilots’ representative. (See Exhibit A to Declaration of Robert  
 18 Spagat (“Spagat Decl.”), June 7, 2007 Hearing Tr. at 128:12-130:12.) Eisenstadt, however, testified  
 19 unequivocally that he was never fired by SkyWest. (See Spagat Decl. Ex. B, June 8, 2007 Rough  
 20 Hearing Tr. at 25:10-28:19.) His testimony about the conversation – that he shared with Alford a  
 21 joke Holt had made – is irreconcilable with Alford’s sworn testimony that Eisenstadt was fired.  
 22 While as told by Alford the story was damning, as recounted by the individual involved in the  
 23 retaliatory “incident,” the episode was nothing more than a joke being misinterpreted and re-told  
 24 under oath in this proceeding. Given that the hearsay testimony admitted over SkyWest’s objection  
 25 is disputed and consists of similarly unreliable recitations of oral conversations, all of the hearsay  
 26 testimony therefore should be stricken.

1           **A. The Conditionally Admitted Testimony About What Purportedly Was Said By**  
 2           **SAPA During New Hire Training Should Be Stricken.**

3           Plaintiffs did not present a single witness with first-hand knowledge as to what allegedly was  
 4           said by SAPA during new hire training. Instead, they offered Stephen Kanuch's double hearsay  
 5           testimony that Mark Nolin, President of SAPA, told him that one time, Jim Black had spoken  
 6           "negatively about ALPA" to a new hire class. (Spagat Decl. Ex. A at 239:13-241:19.) Nolin, in  
 7           turn, testified that he heard about Black's comments from an unidentified pilot, and that when he  
 8           asked Black about this issue, Black "indicated that he had said some things that were inappropriate"  
 9           about ALPA. (Spagat Decl. Ex. B at 121:11-18.) Nolin could not testify about what Black actually  
 10          said because (a) he was not there, and (b) he did not ask Black what was said. (*Id.* at 121:19-20.)  
 11          Thus, Plaintiffs' evidence did not establish what Black said, let alone what was "inappropriate."<sup>2</sup>  
 12          The hearsay testimony regarding Black's purported comments is unreliable hearsay and should be  
 13          stricken.<sup>3</sup>

14           **B. The Conditionally Admitted Testimony About Fear Of Retaliation Should Be**  
 15           **Stricken.**

16          The hearsay testimony of Plaintiff Stephen Dow about an alleged fear of retaliation among  
 17          unnamed SkyWest pilots also should be stricken. Captain Dow testified that his "best guess" was  
 18          that there are 125 members of the SkyWest Pilots ALPA Organizing Committee, only 53 of which  
 19          were willing to be publicly-identified as such because the others either purportedly feared retaliation  
 20          by SkyWest or were concerned that their support for ALPA would affect their ability to get positions  
 21          with other airlines. (Spagat Decl. Ex. A at 13:15-21 & 15:3-14.) Captain Dow's testimony about  
 22          the state of mind of these anonymous pilots is rank hearsay, sheer speculation, or both. Moreover,  
 23          Captain Dow made no effort to quantify how many of these pilots supposedly were concerned about  
 24          how other employers might view their support for ALPA – an issue that has no relevance to this case  
 25          at all – versus those who allegedly were concerned about retaliation by SkyWest. Given the lack of

26          <sup>2</sup> Plaintiffs could have required SkyWest to produce the pilot who heard the comments.  
 27          Instead, they chose to subpoena Kanuch and then produced Nolin.

28          <sup>3</sup> Similarly, Andy Bharath's hearsay testimony on this issue should be stricken. (Spagat Decl. Ex. A at 200:18-201:5.)

1 detail Captain Dow was able to provide and the undisputed testimony that no one ever was  
 2 disciplined for engaging in any pro-ALP activity whatsoever, his hearsay testimony is unreliable and  
 3 should be stricken.

4 **C. The Conditionally Admitted Testimony About Lanyards Should Be Stricken.**

5 Although Plaintiffs knew SkyWest had a policy of prohibiting non-conforming lanyards (*see*,  
 6 *e.g.*, Spagat Decl. Ex. A at 161:2-4); on May 17, 2007 they purportedly decided to have a carrier-  
 7 wide ALPA lanyard campaign (*see id.* at 73:18-74:2). As a result, Plaintiffs are seeking a court  
 8 order requiring SkyWest to permit the wearing of ALPA lanyards. This request apparently is based  
 9 on the theory that SkyWest's lanyard policy is selectively enforced. To that end, various witnesses  
 10 provided hearsay testimony about pilots who told them about requests to remove their ALPA  
 11 lanyards. (*See, e.g., id.* at 51:22-24 & 52:19-22). This hearsay testimony should be stricken,  
 12 particularly in light of SkyWest's evidence that as far back as April 2006, all chief pilots were  
 13 reminded that the lanyard policy was to be enforced regardless of what type of lanyard is worn and  
 14 that the chief pilots – including Captain Tony Fizer, one of the chief pilots about whom the hearsay  
 15 testimony concerned (*see id.* at 52:23-53:2) – has indeed enforced the policy in that manner. (*See*  
 16 Spagat Decl. Ex. B at 109:1-112:22.) Given SkyWest's evidence and the unreliability of Plaintiffs'  
 17 proffered hearsay testimony on alleged discriminatory enforcement, Plaintiffs' hearsay testimony  
 18 about lanyards should be stricken.

19 **III. CONCLUSION**

20 Although the instant brief focuses on only a few examples, SkyWest respectfully requests  
 21 that all of Plaintiffs' hearsay testimony conditionally admitted over SkyWest's objection should be  
 22 stricken because the hearsay testimony about oral conversations is unreliable and disputed.

23 Dated: June 12, 2007

24 WINSTON & STRAWN LLP

25 By: /s/ Robert Spagat  
 26 Robert Spagat

27 Attorneys for Defendant  
 28 SKYWEST AIRLINES, INC.